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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941

No. 939.

OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC.,

*Petitioner,*

VERSUS

WILLIAM H. MISSEL,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

## BRIEF FOR PETITIONER.

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March 9, 1942.

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## BRIEF FOR PETITIONER.

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### OPINIONS BELOW.

The opinion of the District Court overruling Petitioner's motion to dismiss, filed February 20, 1941, is reported in 36 F. Supp. 980 (R. 5-15). Thereupon Petitioner filed answer to the bill of complaint exhibited against it, and the decision of the District Court granting judgment for Petitioner on the merits, filed July 28, 1941, is reported in 40 F. Supp. 174 (R. 27-44).

The Circuit Court of Appeals for the Fourth Circuit reversed the decision of the District Court in an opinion and judgment filed on January 5, 1942, reported in 5 Wage Hour Rept. 25 (R. 56-79).

## JURISDICTION.

The jurisdiction of this Honorable Court is invoked under Section 240 (a) of the Judicial Code, as amended (28 U. S. C. A. 347).

Petition for a stay of the mandate of the Circuit Court pending application for review of its judgment was duly made and allowed (R. 79). On February 16, 1942 this Honorable Court granted the writ of certiorari for which Petitioner had applied.

## STATEMENT OF THE CASE.

This action arises under the Fair Labor Standards Act of 1938, c. 676, Sec. 1 et seq., 52 Stat. 1060, 29 U. S. C. A. Secs. 201 to 219, inclusive, hereinafter sometimes referred to as the Act. Section 13 (b) (1) of this Act contains certain exemptions therefrom as to persons subject to the provisions of Section 204 of the Motor Carrier Act, 1935, (now Interstate Commerce Act, Part II) c. 498, Sec. 1 et seq., 49 Stat. 546, 49 U. S. C. A. 304, and this latter statute is involved in some of the questions presented. The relevant provisions of these two statutes are set forth in the Appendix (pp. 61-66).

The case was tried on complaint, answer, amendment to the complaint, and stipulation of certain facts by the parties. The following are the essential facts (R. 17-18, 28-29).

William H. Missel brought this suit under the Fair Labor Standards Act for overtime wages alleged to be due him

for hours worked in excess of the maximum number prescribed in Section 7, and for an additional equal amount as liquidated damages as provided in Section 16.

He was employed at a regular fixed weekly salary to do a job which necessarily involved irregular, fluctuating periods of work from day to day, rather than to work on a fixed schedule of hours for the day or week. In some weeks he worked less than the number fixed in Section 7 and in other weeks considerably in excess of that number. He was paid a uniform salary regardless of whether his duties required short or long hours, and regardless of absent time. He regulated his on-duty hours according to his own judgment as to what was necessary.

He began his employment with Overnight Motor Transportation Company, Inc., on November 26, 1937, prior to the passage of the Act, and from that date until October 31, 1938, he received $23 per week plus $2.50 cash allowance for supper money, or a total of $25.50 per week. On the latter date, his earnings were increased to $25 per week plus $2.50 allowance, or a total of $27.50 per week, and he was paid this amount until October 19, 1940, when he resigned. It was conceded that the cash supper money allowance is properly to be treated as part of Respondent's wages in interpreting his rights under the Act (R. 28).

The contract of employment was not evidenced by any writing. Respondent's workweek ended on Thursday.

The salary voluntarily agreed upon, paid and accepted as full compensation for his services, at all times, and for all weeks, was in excess of the statutory minimum wage for straight time, and was in excess of one and one-half times the statutory minimum wage for all overtime worked or on duty.

Petitioner is a common carrier of property in interstate commerce by motor vehicle, and as such is subject to the Interstate Commerce Act, Part II, 49 U. S. C. A. 301, 304.

Respondent's duties were those of a rate clerk, cashier and dispatcher, and all duties were conceded to be "in commerce".

The case concerns the period of approximately two years' employment, from October 24, 1938 to October 19, 1940. Respondent was on duty from a minimum of approximately forty hours per week during slack business to an occasional maximum of approximately seventy-five hours per week during the peak business.

For the purpose of presenting a definite factual problem to the District Court it was stipulated that in at least each of two workweeks during the period October 24, 1938 to October 23, 1939,[1] he was on duty as long as 80 hours, and in at least each of three workweeks during the period from October 24, 1939 until he left the company, namely, October 19, 1940,[2] he was on duty as long as 75 hours. These facts served to illustrate the extreme maximum contention of Respondent and made possible the testing of the employment arrangement against the longest possible workweek involved. The average workweek during the two-year period was considerably less than 65 hours (R. 28).

Respondent, after resigning, claimed for the first time that the employment agreement under which he had

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[1] From October 24, 1938 to October 23, 1939, Section 6 of the Fair Labor Standards Act required the payment of a minimum straight time wage of 25¢ per hour for a workweek of 44 hours, as provided by Section 7 (a) (1).

[2] From October 24, 1939 to October 23, 1940, Section 6 of the Fair Labor Standards Act required the payment of a minimum straight wage of 30¢ per hour for a workweek of 42 hours, as provided by Section 7 (a) (2).

worked for two years was null and void and in violation of the Act, for the alleged reason that no weekly contract of employment at a fixed salary, regardless of amount, made in advance of the work to be done, can, as a matter of law, comply with both of Sections 6 and 7. This contention is based on the assumption that lump sum weekly wages are not constructed upon the mathematical overtime wage formula contemplated by Section 7.

On the assumption that Section 7 cannot be applied without an hourly contract rate under Section 6, Respondent claims that the effect of the law is to assign all of the contract salary to a straight time hourly rate, even though the resulting rate is in excess of the statutory minimum wages. The allocation of the contract wage contended for by Respondent is in the alternative (a) for the statutory hours worked or (b) for all of the hours worked. The foundation for Respondent's claim under either theory involves reformation of the contract of employment and is based on forcing the straight time wage above the minimum prescribed by Section 6 and thereby force the result that overtime has not been paid in accordance with Section 7.

Then the Respondent claims that on the alleged unpaid overtime, determined retroactively as aforesaid, there must be added 100% penalty under Section 16, which Respondent claims is mandatory upon the Court regardless of good faith litigation and the "due process" provisions of the Constitution.

Respondent further claims that irrespective of the exemption provision of Section 13 (b), Section 7 is applicable to motor carrier employees retroactively and without regard to date of determination of employees' status by the Interstate Commerce Commission.

## SPECIFICATION OF ERRORS.

I.

The Court below erred in holding that the scope of Section 7 (maximum hours) was unlimited, and was not restricted to the classes of employees covered by Section 6 (minimum wages).

The Court also erred in adopting a construction of the Act which is at variance with the intent of Congress.

II.

The Court below erred in holding that the Act destroyed the private right of contract, instead of construing the Act as having the effect of placing a minimum wage floor below which employer and employee may not contract.

The Court also erred in applying a novel legal presumption that the total contract wage was not intended to and did not include overtime pay at a penalty rate, thereby rejecting the usual and ordinary presumption that parties contemplate compliance with the law in their over-all contract.

III.

The Court below erred in ruling that the double penalty provisions in Section 16 were mandatory upon and not discretionary with the courts. The Court also erred in disregarding Petitioner's contention that the overtime rates provided by Section 7 were in the nature of a penalty. The imposition of these penalties, regardless of the fact of good faith litigation, deprived Petitioner of the protection of the "due process" provisions of the Constitution.

IV.

The Court below erred in failing to determine the issues which were duly raised in the pleadings, and argued, with respect to the legislative function imposed by the Act upon

the Interstate Commerce Commission for the purpose of implementing the scope of Section 7, and in ignoring the fact that during the period involved in this suit the prerequisite determination by the Commission under the primary-jurisdiction rule had not been made.

## SUMMARY OF ARGUMENT.

1. The Fair Labor Standards Act by Section 6 was intended to raise minimum wages of that class of employees who are within the lowest-pay brackets, and through Section 7 to establish minimum overtime wages for the same class of employees covered by Section 6. The result of the provisions of Section 7 is a tendency to spread employment among the same class of persons protected by Section 6. It was not intended by Congress that the scope of the Act would be restricted by Section 6 to a particular class of employees with respect to the straight time provisions, but would be unrestricted and apply without limitation by Section 7 to all classes of employees with respect to the overtime provisions.

*Bourie, et al., v. Gonzales, et al.*, 117 F. (2d) 11;
*Gurtov v. Volk*, 11 N. Y. S. (2d) 604;
*Reeves v. Howard County Refining Co.*, 33 F. Supp. 90;
*U. S. v. F. W. Darby Lumber Co.*, 312 U. S. 100;

See also:

83 Congressional Record 7280, 7283, 7304, 7323, 8428, 9177, 9250, 9251, 9252, 9254, 9256.

2. The Act does not destroy the private right of contract but merely places a minimum wage floor below which employer and employee may not go in their wage agreement. Section 7 has no application to employees paid in excess of this minimum wage requirement, for they are beyond the classes comprehended by the Act in Section 6.

Respondent in this case was of this unaffected class. It is to be presumed that in the agreement between him and the Petitioner the parties contemplated compliance with the law in their over-all contract and that it therefore was intended to and did include overtime pay at a penalty rate. The facts in this case clearly disclose that full compliance with the Act was well within a reasonable construction of the contract.

*Fleming v. A. H. Belo Corp.*, 121 F. (2d) 207;
*Fleming v. Stone, et al.*, 41 F. Supp. 1000;
*Schlee v. Lincoln Oil Co.* (C. C. Wayne Co., Mich., 12/31/41), 5 Wage Hour Rept. 72;
*Woods v. Wilkerson*, 40 F. Supp. 131.

3. This Court has uniformly held that it would be a violation of the "due process" provisions of the Constitution to deprive parties of access to the courts through the infliction of penalties during the period of good faith litigation. The language of the Act is similar to that of other federal and state laws which impose penalties for violation, but it has never been considered under these statutes that the imposition of penalties was mandatory upon the courts. The provisions of Section 16 and Section 7 are penalties, and it is discretionary with the Court whether they are to be imposed in this case.

*Ex parte Young*, 209 U. S. 123;
*O'Hara, et al., v. Luckenbach S. S. Co.*, 16 F. (2d) 681;
*Chicago S. S. & S. B. R. R. v. Fleming*, 109 F. (2d) 419;
*Uebersee Finanz-Korporation v. Rosen*, 83 F. (2d) 225.

4. Section 13 (b) (1) of the Act contains an exemption with respect to employees of motor carriers who are subject to the power of the Interstate Commerce Commission

to fix their qualifications and hours of service. Under the primary-jurisdiction rule, a prior determination of facts must be made by the Commission before resort may be had to the courts.

The exemption runs to the power of the Commission; and the determination of employee status is in the nature of a legislative act necessary to implement the application of Section 7. As to this class of employees who would otherwise be subject to the dual jurisdiction of both statutes, the Fair Labor Standards Act speaks only from the date of the prerequisite determination of fact by the Commission.

*Faulkner v. Little Rock Furniture Mfg. Co.*, 32 F. Supp. 590;
*Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U. S. 285;
*Mitchell Coal & Coke Co. v. Pennsylvania R. R.*, 230 U. S. 247;
*Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426;
*West v. Smoky Mountain Stages*, 40 F. Supp. 296.

## ARGUMENT.

### I.

**THE SCOPE OF SECTION 7 (MAXIMUM HOURS) IS LIMITED, AND IS RESTRICTED TO THE CLASSES OF EMPLOYEES COVERED BY SECTION 6 (MINIMUM WAGES). THIS INTERPRETATION IS CONSISTENT WITH THE PROVISIONS OF THE ACT AND IS SUPPORTED BY THE LEGISLATIVE HISTORY OF THE ACT.**

The primary issue in this case is whether the Fair Labor Standards Act by Section 6 was intended to raise minimum wages of that class of employees who are within the lowest-paid brackets, and through Section 7 to establish minimum overtime wages for the same class of employees covered by Section 6; or whether Section 6 of the Act, covering

straight time wages, alone had class limitations and Section 7, covering overtime wages, went beyond this class scope and applied to all classes of employees, irrespective of income or employment conditions.

There can be no question that Section 6 and Section 8 have as their sole purpose the establishment of minimum wages, nor can there be any doubt concerning the constitutionality of the Act insofar as the accomplishment of these purposes is concerned.

The interpretation of Section 7 is not so obvious and the meaning of its provision for overtime pay *"at a rate not less than one and one-half times the regular rate at which he is employed"* has been the subject of more frequent dispute and more confusing interpretation than any other single question in the administration and enforcement of the Act.[3] The office of the Administrator has itself issued conflicting interpretations.

Petitioner contends that the maximum hours provision of Section 7 relates to those persons governed by the minimum wage provisions of Section 6, and later by Section 8, i. e., the Act fixes maximum hours which may be worked at minimum wages, and requires that overtime be compensated at or in excess of one and one-half times these minimum wages. This construction is that Sections 6, 7 and 8 are intended to be read together as co-related provisions of one law accomplishing the one purpose of raising the standard of living for low-paid workers. The result of Section 7 is a tendency to spread employment among the same class of persons protected by Section 6. Therefore, overtime penalty wages are to be compensated at one

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[3] See petition of Administrator in this proceeding for leave to file brief and present oral argument as amicus curiae (R. 53-54).

and one-half times the straight time rates of employment provided for in Section 6. Respondent was at all times paid in excess of this minimum wage requirement and hence Petitioner has fully satisfied the law.

Respondent's interpretation of this disputed phrase broadens the scope of the law to the extreme of placing a ceiling on hours of employment for all persons regardless of salary or skill, with exceptions only as to those employees engaged in purely intrastate activities and those exempted by the provisions of Section 13. The legislative history of the Act appears to reveal that such an extensive scope goes far beyond the achievement of the particular objects that Congress had in view.

The question presented is not so simple as to merely involve literal construction as distinguished from Congressional intent. That statement of the case would presuppose that the so-called literal construction would be inconsistent with Congressional intent. Petitioner contends that the literal provisions are entirely consistent with the intent of Congress. The "regular rate" referred to in Section 7 can, and we think does, refer to any one of the numerous regular rates of pay established under Section 6 or which may be established under Section 8.

It is significant in reading the Act to note that the word "rate" appears in Sections 6, 7, and 8 a total of 14 times. A consistent interpretation of the phrase is possible if we consider this often repeated word to always relate to the same thing, namely, the minimum rate prescribed in Section 6, the minimum rate for overtime prescribed in Section 7, and the minimum rate to be established by the Administrator under his administrative powers as set forth in Section 8. Any other interpretation necessarily means that the word "rate" connotes a different thing at its vari-

ous places of use in the statute and that Congress did not intend it to always import the same meaning—"minimum wage".

Respondent assumes that "regular rate", as used in Section 7, disregards all other rates and ceilings on rates fixed by the Act, and his construction is that Section 7 reaches all rates and all classes of employees. This would be a strange result to flow from a minimum wage law, intended to merely make a small beginning in the field of federal wage and hour legislation.

Respondent's interpretation makes novel legislation of a statute which under Petitioner's construction is a sensible, progressive law following established patterns of minimum wage regulation. Furthermore, it raises serious doubts as to the constitutionality of the entire Section 7 of the Act.

It is therefore essential for the proper determination of the scope of Section 7 to carefully consider this language of the Act as an entirety, to reflect upon the purposes which are recited in the Act, to review its legislative history to ascertain the Congressional intent, and to determine whether the minimum wage and maximum hour provisions are included as conjunctive features of a minimum wage law or as independent features of two separate laws intended to accomplish the unrelated purposes of (a) floor on wages for a limited class and (b) ceiling on hours for an unlimited class.

**Purposes Recited in the Act.**

There is no doubt that the primary purpose of the Act was the establishment of a universal minimum wage in each industry engaged in commerce or production of goods

for commerce. This observation is of a certainty borne out by Section 8 (a) of the Act and also by the Declaration of Policy contained in Section 2 (a) and (b).

It is to be noted that no mention is made in any part of the Act of any purpose other than that of achieving the "objective of a universal minimum wage" in all industry engaged in commerce,[4] whereby "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers"[5] can be corrected "without substantially curtailing employment or earning power".[6]

It is essential that the statute be construed if possible so as to effectuate the purpose which Congress had *primarily* in view.

> *Platt v. The Union Pacific Railroad Co., et al.*, 99 U. S. 48.
>
> "But in construing a statute we are not always confined to a literal reading, and may consider its object and purpose, the things with which it is dealing, and the condition of affairs which led to its enactment. . . ."
>
> *American Tobacco Co. v. Werckmeister*, 207 U. S. 284, 293.

In the case of *U. S. v. American Trucking Assns., Inc.*, 310 U. S. 534, at pages 543-4, the Court said that when the meaning of the words used in a statute "has led to absurd or futile results," it has looked beyond the words to the

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[4] "Sec. 8(a). *With a view to carrying out the policy of this Act by reaching*, as rapidly as is economically feasible without substantially curtailing employment, *the objective of a universal minimum wage* of 40¢ an hour in each industry engaged in commerce or in the production of goods for commerce. . . ."

[5] Section 2(a).

[6] Section 2(b).

purpose of the Act. Frequently, however, *even when the "plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words . . : however clear the words may appear on 'superficial examination' . . ."*

The Court further said:

> "The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion.
>
> *"Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, 'excepting as a different purpose is plainly shown'."*

It is also essential that the declaration of policy be considered where an aid to construction is needed.

> *Church of the Holy Trinity v. U. S.*, 143 U. S. 457;
> *Coosow Mining Co. v. State of South Carolina*, 144 U. S. 550.

Respondent's interpretation of the disputed phrase certainly produces an unreasonable and most revolutionary

result. It would result in regimenting all earners throughout the country without regard to any requirement of improving their "standard of living". It is in conflict with Sec. 2 (b), for if an employer must pay time and one-half a rate based upon the high wage he now pays, employers must of necessity reduce current high wages and decrease hours of work for all of their employees, whether hired at an hourly or weekly rate; but, Sec. 2 (b) provides that the sub-standard conditions mentioned in the Declaration of Policy should be eliminated without substantially curtailing employment or earning power.

**Intent of Congress.**

For proper construction of the Act it is therefore necessary to ascertain the intent of Congress. Full review of the legislative history of this statute, beginning with the President's message to Congress, and going through the Committee hearings, the Committee reports and the debates on the floor, fails to give any support for Respondent's contention that the phrase in question may be isolated from both the Act and its legislative history and be applied to employees generally without regard to rates of compensation, and to social and economic conditions which are wholly unrelated to the poorly paid classes of employees which alone concerned the nation and the Congress when the law was passed.

The Wage and Hour Manual, 1941 Edition, sets forth the President's message, page 747; the conference report and agreement, at page 749; the House amendment, at page 755; and conference agreement, page 759.

Further information concerning the intent of Congress may be had from the statements of the chairmen of the

committees in charge of the conference bill, and the explanations of committee members and others in the course of the debates.

In view of the fact that the present Fair Labor Standards Act was prepared by conferees, very little light is to be gleaned from the committee hearings. This legislation was pending before Congress for more than two years. The House and Senate passed radically different bills. Conferees were appointed and according to the custom, when there are such radical differences in the bills passed by the respective Houses that they cannot be reconciled, they proceeded to write a bill of their own.

Members of Congress seemed to have been uncertain as to the meaning of this bill which was produced by the conferees. Whereupon, Mrs. Norton, Chairman of the Labor Committee, one of the conferees, and sponsor of the legislation in the House, hastened to allay all fears and explain that they were dealing with minimum wages only. Here is what she said in her opening statement on May 23, 1938:

> "Let it be understood right here that this does not in any sense compel any person who is paying more than 40 cents an hour or working his employees less than 40 hours a week to do otherwise. We are not interested in that employer for the purposes of this bill. I say this because this question has been continually raised." (83 Cong. Rec. 7280).

Other interesting comments on various bills are as follows:

—S. and H. R. Conference agreement report—83 Cong. Rec., page 9254, June 14, 1938:

> "Sec. 7. * * * and 40 hours a week thereafter, with overtime work permissible upon the payment of one and one-half times the regular wage rate."

This Conference agreement superseded the original House provision shown at page 9252, which was as follows:

> "Sec. 5. * * * No employee is to be deemed to be employed in violation of this section if he receives additional compensation for his overtime employment at the rate of one and one-half times the regular hourly rate at which he is employed, or times the rate applicable under or pursuant to the act, *which ever is higher.*"

The Conference report superseded the Senate bill which was as follows, page 9250:

> "Sec. 5. * * * Nothing in the act or in any regulation or order of the board shall be construed to interfere with the right of employees to bargain collectively or otherwise engage in concerted activities to obtain a wage in excess of the applicable minimum under the bill or to obtain a shorter work week than the maximum work week under the bill, or other benefits or advantages."

Congressman Brewster, page 8428, June 7, 1938, compared the House and Senate Bills and made this statement:

> "The House bill provides that work over the maximum hours fixed by its bill will be permitted if time and a half for overtime hours is paid. The Senate bill requires time and a half, but between midnight and six o'clock in the morning, where continuous operation is not essential, overtime must be paid, even if maximum hours per week are not worked."

The Conference report, page 9251, June 14, 1938, further reported with reference to the Senate Bill:

> "Sec. 9. * * * *and the policy is declared that orders relating to wages shall affect only those employees who need legislative protection and shall not interfere with the voluntary establishment of appropriate differentials and higher standards for other employees in the occupation.*"

Senator Borah, page 9177, June 14, 1938:

"Q. Does this bill wipe out all differentials in all wages above the minimum wage in various parts of the country? A. Oh, no. *Only differentials in minimum wages and maximum hours of employment. Congress has no authority to deal with other wages.* All wage earners have a constitutional right to bargain for whatever wage they choose. *The Federal government only has authority to deal with minimum wages* because minimum wages and hours of employment relate to the health and general welfare of the citizens, and it legislates in this field solely because it can be justified on humanitarian grounds. Both federal and state constitutions forbid the fixing of any wage by law other than the minimum. * * * These will not interfere except in the only field where the federal government may interfere, namely, minimum wages. *Differentials in other wages are not and cannot be regulated by the federal government.*"

Chairman Norton, page 9256, June 14, 1938:

"You will recall that the House bill contained three basic principles: First, an absolute floor on wages and an absolute ceiling on hours. * * * On the other hand, the Senate bill contained just the reverse of these principles—a ceiling on wages and a floor on hours."

Congressman Curley (Member of Labor Committee on H. R. bill), page 7283, May 23, 1938:

"* * * This vast helpless group of *unskilled labor* are the exploited type so specifically requiring the protection of the strong arm of Uncle Sam. There is no conflict of jurisdiction under the provisions of this fair standards of labor bill and the existing labor organizations of this country. *The bill concerns only of relieving the paralysis which, at present, shackles misery and poverty to millions of heads of families, who are underpaid* and causing a collateral financial loss in purchasing power because of the existing deplorable conditions."

Congressman Ramspeck, page 7304, May 23, 1938, quoting New York Times of May 22, 1938:

> "The House wage-hour bill, it is true, does not absolutely prohibit a working week in excess of 40 hours, but provides that hours in excess of that must be paid for at the rate of one and one-half times the regular hourly rate. For many marginal firms and others this will be equivalent to prohibition, *particularly in view of the increases provided in regular hourly rates by the bill.*"

Congress was on notice that the nation understood "regular hourly rates" to be those which were provided as minimum wages under Section 6.

Congressman Voorhis, page 7323, May 23, 1938:

> "Mr. Chairman, this wage hour bill amounts simply to an attempt to raise a little the standards of the *poorest paid workers of this country.* It represents a statement by Congress that there is a standard below which no American citizen shall be asked to work. Certainly the standard is modest enough. With millions unemployed it is indeed difficult to see how a logical argument can be made for a longer week than 40 hours. But even that standard will not be reached for 2 years' time; and the bill, of course, does not actually forbid a work week of longer duration but requires that if a man does work additional time he should be *paid time and a half for it. The 25¢ minimum wage,* for which the bill provides in the first year of its operation, spells only $10 a week, and about $40 per month, and $480 a year. Even when we get up to a 40c minimum at the end of 3 years, workers protected by the act will only be receiving $768, for a year's work if they do not lose a single regular working day."

The phrase in question has not been passed upon by this Court although the purpose of the Act was stated by it in the case of *U. S. v. F. W. Darby Lumber Co.*, 312 U. S.

100, in which the constitutionality of the Act was sustained on the ground that it was within the commerce power and consistent with the Fifth and Tenth Amendments, the Court saying[7] (page 125):

> *"Both provisions are minimum wage requirements compelling the payment of a minimum standard wage* with a prescribed increased wage for overtime of 'not less than one and one-half times the regular rate' at which the worker is employed."

In the case of *Wilson v. Rousseau, et al.*, 4 How. 646, this Court refused to permit a literal construction of a statute governing patents, saying (page 678):

> "Nothing short of the most fixed and positive terms of the statute could justify an interpretation so repugnant to the whole scope and policy of it, to wise an judicious legislation."

Petitioner submits a reasonable interpretation of the disputed phrase, consistent with the already discussed obvious purpose of the Act, and sound in that it does not involve an unconstitutional construction of Section 7. This reasonable and sound interpretation obtains by a reading of the maximum hour provisions of Section 7 as relating to the minimum rates prescribed in Sections 6 and 8.

It is not possible to urge that the law accomplishes two independent and unrelated purposes, namely, minimum wages and maximum hours. It is essential that the two be read together in order to sensibly apply the rule of each. In the case of *Drake v. Hirsch*, 40 F. Supp. 290, an employee worked at less than the statutory minimum rate prescribed in Section 6 and for a longer workweek than the maximum set forth in Section 7. A literal construction, strictly applied in such type of case would

[7] As to Sections 6 and 7.

result in an employee receiving time and one-half the actual rate at which he was employed, and if his actual rate were 18¢ an hour he would receive under such interpretation 30¢ an hour for the first 40 hours and 27¢ an hour for the overtime. The court, however, determined that both sections must be read together and that the minimum wage described by the Act necessarily becomes a legal "regular rate" upon which overtime is computed. Petitioner merely applies the corrolary of this rule.

There can be no question that this was intended to be a "poor man's" law. The Circuit Court of Appeals for the First Circuit, in the case of *Bowie, et al. v. Gonzales, et al.*, 117 F. (2d) 11, clearly points out that the purpose of the law was to cure and to eliminate *"the usual evils of sweatshop conditions of long hours indoors at low wages"* (Page 18).

From the foregoing discussion it is apparent that the Declaration of Policy, the legislative history, and the numerous provisions of the Act afford only a vacuum as a setting for Respondent's contention that Section 7 has a broader class coverage than Section 6. Furthermore, such contention compels the phrase *"not less than* one and one-half times the regular rate" to be inapplicable to all salary agreements and requires reformation of every salary agreement.

**Cases Interpreting Section 7.**

Under varying facts and circumstances, a number of federal and state courts have taken the view that the Fair Labor Standards Act was a minimum wage law which placed a floor below which employer and employee could not go in their wage contractual relations, and that the Act did not otherwise impair the right of contract, for

Section 7 had no application to highly paid employees beyond the classes covered by Section 6.

*Fleming v. A. H. Belo Corp.* (C. C. A. 5th), 121 F. (2d) 207;
*Fleming v. Atlantic Co.*, 40 F. Supp. 654;
*Fleming v. Stone et al.*, 41 F. Supp. 1000;
*Gurlov v. Volk*, 11 N. Y. S. (2d) 604;
*Reeves v. Howard County Refining Co.*, 33 F. Supp. 90;
*Schlee v. Lincoln Oil Co.* (C. C. Wayne Co., Mich., 12/31/41), 5 Wage Hour Rept. 72;
*Woods v. Wilkerson*, 40 F. Supp. 131.
*Bumpus v. Continental Baking Co.* (C. C. A. 6th), 124 F. (2d) 549.

In *Reeves v. Howard County Refining Co.*, supra, in passing upon an action for amounts of money allegedly due employees under the Act, the court said:

> "The court understands the law to be that this Act . . . is what the name implies, a minimum wage and hour Act, and that parties may contract with reference to hours and compensation at will, provided the compensation to be paid is not less than the scale fixed by the law." (Page 91)
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> * * * * * *
>
> "Considering the number of hours actually worked, this pay exceeds the minimum time and overtime provided by the Act, and therefore complied with the Act, and the court finds that C. C. Reeves is not entitled to recover anything from Defendant, he having entered into a contract for a stipulated consideration which is in excess of the minimum wage fixed by the law, and that he had a right to make such agreement and having entered into such agreement, he is bound thereby." (Page 91)

In the case of *Fleming v. A. H. Belo Corp.*, supra, an elaborate review was made by the court of the legislative history and underlying purposes of the Act. In that case, the employees formerly had been engaged on a weekly

salary. In an endeavor to comply with the provisions of the Act, the employer made a contract of employment with them, at a basic hourly rate of pay (lower that the actual rate according to the Administrator's contention) which provided payment for overtime work at a rate of not less than one and one-half times such basic rate, with the guarantee that the aggregate pay for regular and overtime work would amount each week to as much or more than a certain definite sum[8] stated in the contract. The court stated at page 212:

> "When we turn to the legislative history of the Act, appellant stands no better. For there is no reference in the whole legislative history to prohibiting agreements between employer and employee, as here, for all inclusive and regular weekly salaries, none whatever to the effect that it was intended that persons already paying more than the minimum wage the Act provided, should be compelled to pay still more".

Some of the decisions in cases involving interpretation of the phrase appear to have been on a technical ground that where a contract existed between employer and employee, to do a job which involved a number of hours in excess of the maximum provided in Section 7, *the contract is honored* although the regular rate used by the employer in computing overtime at one and one-half times the "regular rate" is not the actual rate according to the interpretation of the Administrator.

*Fleming v. Stone, et al.*, supra.

Also, where the contract was made in contemplation of the Act and the employer established what he called a "regular rate" (although this was at variance with the actual rate if the method of the Administrator is considered) and paid overtime at least one and one-half times the

[8] The former weekly salary, or higher.

so established "regular rate", such arrangement has been sustained by the courts as a valid contract not prohibited by the Act.

*Fleming v. A. H. Belo Corp.*, supra;
*Fleming v. Atlantic Company*, supra.

If this Court follows the line of cases just mentioned, then necessarily Respondent can not recover for he was hired by contract made prior to the passage of the Act, to do a job which involved a varying number of hours, usually in excess of the maximum hours prescribed by Section 7.

Numerous federal and state courts have reached a different conclusion and held that Section 7 required the payment of penalty wages for all classes of employees regardless of salary, and with respect to salaried employees paid on a weekly or monthly basis it had the further effect of reforming the contracts by establishing straight time hourly rates in excess of the statutory provisions of Section 6. The principal cases are:

*Bumpus v. Continental Baking Co.* (C. C. A. 6th), 124 F. (2d) 549;
*Dubois Soap Co. v. Floyd* (C. A. Ohio, 9/15/41), 4 Wage Hour Rept. 541;
*Fleming v. Carleton Screw Products Co.*, 37 F. Supp. 754;
*Fleming v. Pearson Hardwood Flooring Co.*, 39 F. Supp. 300;
*Haddad v. Beckerman Shoe Corp.* (C. P. Berks Co., Pa., 5/5/41), 4 Wage Hour Rept. 329;
*McLendon v. Bewley Mills* (N. D. Tex., 12/10/40), 4 Wage Hour Rept. 30;
*Muldowney v. Seaberg Elevator Co., Inc.*, 39 F. Supp. 275;
*St. John v. Brown*, 38 F. Supp. 385;
*Williams v. General Mills*, 39 F. Supp. 849.

The cases just above recited hold that the "regular rate of pay" is determined by dividing the total number of hours worked in any workweek into the total sum of wages paid. In two recent decisions, a new method of computation has been evolved to determine this mathematical "regular rate", viz.: division of the statutory number of hours provided in Section 7 into the total sum of wages paid.

*McClure v. Schulze Baking Co.* (C. C. Winnebago Co., Ill., 11/21/41), 5 Wage Hour Rept. 53;

*Allen v. Moe* (D. C., Idaho, 12/10/41), 5 Wage Hour Rept. 71.

Three Circuit Courts have passed on some phases of the questions. The general tenor of these Circuit Court decisions has been to extend the coverage of the Act, through Section 7 (maximum hours), to classes of employees not covered by Section 6 (minimum wages). It does not seem possible to reconcile the statements of the Circuit Courts with respect to the private right of contract for compensation in excess of minimum wages, and the actual effect of the decisions as applied to cases involving weekly or monthly wage contracts exceeding the minimum provisions.

*Bumpus v. Continental Baking Co.* (C. C. A., 6th), 124 F. 2d) 549;

*Fleming v. A. H. Belo Corp.* (C. C. A., 5th), 121 F. (2d) 207;

*Missel v. Overnight Motor Transportation Co., Inc.* (C. C. A. 4th, 1/5/42), 5 Wage Hour Rept. 25;

*Warren-Bradshaw Drilling Co. v. Hall* (C. C. A., 5th), 124 F. (2d) 42.

**Rulings By The Administrator.**

The Administrator of the Fair Labor Standards Act has from time to time been accredited with administrative rulings, and the argument is made in cases of the type in-

volved in the suit at bar that such interpretations of a new statute are entitled to great weight. However, it is not in any instance urged that the Administrator may by administrative ruling broaden or restrict the application of the statute which he has the responsibility of administering.

It is therefore necessary that we understand what is an administrative ruling and that we clearly distinguish it from a press release, interdepartmental instructions, correspondence and the like.

A true administrative ruling is required by Congress to be published in the Federal Register.[9] The required publication of these "rulings" was intended by Congress to give dignity to the pronouncement of interpretation by the Administrator and officially inform the public of these actions by the Administrator.

There can be no question that the Administrator of the Fair Labor Standards Act was well aware of this enactment and that if he intended his interpretations to have proper status it is fair to presume that he would have caused them to be published as required. Interpretative Bulletins Nos. 4 and 9 are not so published; they are not even signed. They are not set forth in the Federal Registry. They are not colored with any dignity whatsoever.

Furthermore, they relate to matters beyond the proper jurisdiction of the Administrator to rule upon inasmuch as they concern the statute not for the purpose of "setting its machinery in motion, of making its parts work efficiently and smoothly while they are yet untried and new", the purpose sanctioned by this Court in *U. S. v. American Trucking Assns., Inc.*, 310 U. S. 534, 549, but endeavor to pass final ruling on a question of jurisdiction, and this latter question is one solely for the courts.

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[9] *Federal Registry Act*, 44 U. S. C. A. 301, *et seq.*

It is not clear that the Administrator did intend to preempt the field of jurisdiction from the courts when he issued Interpretative Bulletin No. 9 in June 1940, for that Bulletin's preamble clearly states that it is merely indicative of the course the Administrator will follow until an authoritative ruling from the courts is had.[10] The revised Interpretative Bulletin No. 4[11] issued October 1940, contains no such limitation but it is not certain whether the Administrator omitted comment concerning status of that report through oversight or for the reason that he wished to assume jurisdiction over matters that properly belong to the courts. It is significant that this reissue assumes a position with respect to the proper interpretation of the words "regular rate of pay" which is diametrically opposite that taken by a former Administrator who was in charge on the date the law became operative,[12] and in conflict with the opinion given on April 1, 1941, by an Assistant

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[10] Interpretative Bulletin No. 9, 1941 W. H. Man. 293: "The Act confers no authority upon the Administrator to extend or restrict the scope of the exemption provided in Sec. 13(b)(1) or even to impose legally binding interpretations as to its meaning. This bulletin is merely intended to indicate the course which the Administrator will follow in the performance of his administrative duties until otherwise required by the authoritative rulings of the courts."

[11] 1941 W. H. Man. 127.

[12] Labor Relation Reporter, October 24, 1938; 3 Wage Hour Rept. 228 (September 29, 1938): Open forum discussion at Birmingham, Ala. Mr. Andrews, former Wage-Hour Administrator, stated:

> ". . . Clerical forces, we all feel, are included in the Act. But I cannot see where there is going to be any practical difficulty there because your clerical force in any plant of any consequence certainly is earning on a basis of more than 25 cents an hour weekly wages divided by the hours they work. If they are well above 25 cents an hour, it seems to me that there would not be much question about time and a half for overtime, because you could figure in that weekly wage that time and a half over the 44 hours had been given consideration as remuneration for their full week's work."

Solicitor of the Wage-Hour Division to the field representatives of the Labor Department for their guidance in enforcing the law.[13]

In the *American Trucking Assns., Inc.* case, supra, the fact that the administrative rulings were not published in the Federal Registry was not brought to the attention of this Court nor considered in its opinion and it is urged that the Court would not have honored them had it been informed of this fact.

**Position Of The Administrator.**

The Administrator of the Wage and Hour Division, United States Department of Labor, was permitted by the Court below to intervene as *amicus curiae* and file brief. The underlying philosophy of the Administrator's contention was that the Act was purposed to spread employment, and that by requiring payment for overtime at one and one-half times an employee's "actual rate" as determined

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[13] 4 Wage Hour Rept. 181, 182 (April 1, 1941):

"The question is one of fact. . . . For our purposes the distinction between so-called irregular and fluctuating or regular workweek is much the same. The test is, does the employer hire the employee at a salary for a certain number of hours and does he, therefore, owe the employee additional compensation on a prorata basis when that specified number of hours is exceeded; or can the employer successfully contend that the facts and circumstances of employment are such that the salary is the employee's regular compensation for all hours worked, no matter what the exact number of hours may be? . . . We have to know when an employee works 60 hours and receives a salary of $30 in a given workweek, whether or not that $30 is all the employer owes the employee as his regular compensation for a workweek of such length. A test such as the following may prove workable: Is the salaried employee hired to do a job rather than to work a schedule of hours? Does the job necessarily involve irregular or fluctuating hours per day or week? The questions taken together constitute a single test; one question is not complete in itself."

by the mathematical formula prescribed by the Administrator, the employer would be discouraged from working one person many hours in excess of the maximum rather than dividing the work, with the result that employment would be afforded to others.

In this brief it was stated that Congress could have imposed a "rigid prohibition on work" in excess of the statutory maximum hours, and that it merely adopted a less drastic method by imposing a "penalty" on overtime work, which was intended to have a deterring effect, but nonetheless made it permissible to work in excess of the maximum hours if the penalty was paid.

The basic theme seems to be that Congress must have recognized it to be an anti-social condition for a wage-earner to be employed for a workweek longer than the maximum, and that it therefore set out to accomplish the ultimate goal of a maximum workweek. In response to this position, it should be sufficient to say that there is no indication of such purpose anywhere in the Act, and that there is a statement in Section 2 (b), as to existing employees, that the Act shall not be construed as "substantially curtailing employment or earning power".

Application of the Administrator's contention affects only those persons employed at the date the law became operative; *it spreads employment only as to the worker having a job;* it does not affect newly hired employees at all for cautious employers would establish a "regular rate" with time and one-half provision for overtime and the newly employed worker would still work a stipulated 50 or 60 hours as the case may be.

This construction reduces the "earning power" of existing employees, contrary to the declared purpose of the Act, for if the employee's "regular rate" is construed to be his

"actual rate" as computed by the Administrator, and if the intent is to spread employment and discourage overtime, it necessarily follows that the employee's earning power and employment is curtailed; i. e., he is paid 40 hours at his "actual rate", rather than 60 hours at his "actual rate".

Section 13 (a) exempts executive and administrative employees, whom the Administrator has defined as a person employed in such capacity and earning $30 per week or more. If the Act is purposed to correct anti-social conditions is it just as anti-social to have a $30 per week branch manager working a week of 60 hours as it is to have a $100 per week skilled mechanic working a week of the same duration.

Some of the cases sustaining the Administrator's view have stated that the overtime rate provision was intended to be "additional compensation as earning"—something like a bonus. The $30 per week executive, every employee of a railroad including nightwatchmen and gatetenders, and seasonal and agricultural employees are exempted from such bonus opportunity, and such interpretation presumes that Congress intended to discriminate against such persons.

The more logical interpretation of the exemption provisions of Section 13 (a) and (b) is that these persons do not require that their "standard of living" be raised inasmuch as they are employed at more than the minimum wage, and it was not necessary to legislate for them. The exemption obviates the need of complying with the requirements of Section 11 (c) with respect to keeping record of hours worked and wages paid to them.

Petitioner questions whether Congress could constitutionally legislate as to wages which are not related to health, morals, welfare, or matters affected by a public

interest. The law fixes no ceiling on hours and if paid at the proper overtime rate an employee could work 125 hours a week, if employer and employee desired to make such agreement. The law therefore is necessarily a minimum wage law and not a maximum hour law. Suffice to say that Congress has never yet arbitrarily fixed wages above a minimum where same were not related to some other federal power.

*Wilson, etc., v. New, et al.*, 243 U. S. 332;
*U. S. v. F. W. Darby Lumber Co.*, 312 U. S. 100.

The Administrator's position is that there can be no weekly salary agreement made in advance for the doing of a "job" and that a company cannot guarantee a worker a uniform salary affording pay while absent, sick, on vacation, or during slack season, even if such salary is in excess of the minimums of Sections 6 and 7. It is also that the "regular rate" of an employee working a varying number of hours per week can only be determined after the week's job has been done and the worker has been paid, and then, overtime compensation is computed to determine how much more is due. This is a strange "regular rate" indeed.

It is not believed that this Court will conclude that the phrase "regular rate at which he is employed" applies to the instant case where Respondent at all times was paid in excess of the minimum rate of Section 6 and one and one-half times such minimum rate for all hours in excess of the maximum prescribed by Section 7. Respondent was not employed at a rate per hour; his regular rate was his weekly rate and it is not sound to contend that an hourly rate can be computed from this weekly rate. An average of hours *customarily* worked per week can not be used in an effort to reach an hourly rate, for Respondent

did not work any *customary* number of hours per week. The inescapable conclusion of Respondent's argument is that "the regular rate at which he is employed", when applied to Respondent, varies from week to week; nothing could be more strained than to urge that his "regular rate" is this fluctuating, mathematical hourly rate—*a most irregular rate.*

Finally, let us suppose the following situation and the effect of Respondent's contention thereon. A company employing a worker at $30 for a sixty-hour week is mindful of the law and of the Administrator's Interpretative Bulletin No. 4 and computes that thereunder the worker is entitled to an additional sum of $4.00 to offset the overtime requirement for the sixty-hour week. Without discussion with either the worker or a representative of the Administrator, the salary is increased to $34 per week. The worker thereafter brings suit under the Act, and contends as to the latter period that his regular rate of pay is $.567 per hour ($34 ÷ 60) and for 44 hours he is entitled to $24.95; that his overtime rate of one and one-half times the regular rate is $.851 per hour and for the additional 16 hours he is entitled to $13.62; making the total sum due of $38.57, or a deficiency of $4.57 each week.

No construction in good conscience could permit such a travesty of justice and for some special reason then evolved, those courts which sustain Respondent's view would of certainty deny the worker's claim for a "windfall". But any special ground would be at variance with the Administrator's interpretation of the law.

In the case at bar a wage increase of $2.00 per week was given seven days after the law became effective, but here the undisclosed intention was to reward a deserving employee for faithful and loyal service. Could any sound

distinction be made to rationalize a difference in result? Are the circumstances of each individual employment contract, in fact as well as those unexpressed and in contemplation only, to be considered in order to determine whether or not the law has been violated? Was it the intention of Congress to require the employment contracts of a multitude of types and relating to millions of persons to be remade so as to conform to a uniform, standard pattern supposedly fixed by this law?

Under Respondent's interpretation this $2.00 increase in his weekly salary served only to raise the "rate" upon which his claim of overtime is premised, and resulted in enlarging the amount claimed in this suit, or to state it bluntly, the intended generous and voluntary increase by Petitioner actually became a boomerang if this contention is sustained by this Court.

The national ills which the Act in its declared policy was intended to correct would be nothing in comparison to the economic national ills which would result from this strained application of the overtime rule which is urged by Respondent in this case; the cure would be far worse than the disease. *In the trucking industry alone, which relied on the statutory power of the Interstate Commerce Commission under Section 204 (a) (1) and (2) as construed by a three-judge court in American Trucking Assns. v. U. S. 31 F. Supp. 35, together with the exemption in Section 13 (b) of the Fair Labor Standards Act, all of which found expression in thousands of collective bargaining agreements with unions, the potential claims would exceed the total capital of this industry which employs more persons than any other in America, excepting only agriculture and retail trades.*

The conclusion is compelling that the law is but intended to place a floor below which the rate of wage could not go, but otherwise, existing contracts were not reformed and the freedom of contract was not impaired.

## II.

**THE PRIVATE RIGHT OF CONTRACT IS NOT DESTROYED BY THE ACT, BUT IS MERELY RESTRICTED BY A MINIMUM WAGE FLOOR BELOW WHICH EMPLOYER AND EMPLOYEE MAY NOT CONTRACT. PETITIONER IS ENTITLED TO THE USUAL AND ORDINARY PRESUMPTION THAT THE PARTIES CONTEMPLATED COMPLIANCE WITH THE LAW IN THEIR OVER-ALL CONTRACT.**

Respondent was employed by Petitioner prior to the passage of the Act and for two years subsequent thereto. He was always employed by the week at a weekly salary. He was the office man at a small truck terminal where the volume of business varied from day to day, week to week, and according to the seasons of the year and change in business conditions. There was never enough business for an around-the-clock office set-up. During slack periods, the on-duty hours would be as low as 40, possibly less, and during periods of unusual activity, he would have to look after matters which involved being on duty or responsible for results, for as much as 75 hours.

In a limited sense, he was in charge because there was no one present at all times to direct his activities. He knew when the trucks were expected to come and expected to go, and he adjusted his on-duty hours, or presence at the terminal, according to his judgment as to the necessities of the occasion. These were the facts which led to his employment to do a job, as distinguished from employment by the hour or for a particular number of hours per week.

He was entitled to some absent time with pay, and if he was sick or had any other occasion to be away from his

job for reasonable periods, no deductions were made from his salary. In many respects, he might be considered as a minor executive or administrative employee of the kind exempt under Section 13(a) of the Act. But the Administrator was given the power to define administrative and executive employees and under the Administrator's definitions, from time to time, there may be some doubt whether he can be qualified as an executive or administrative employee, because he did a certain amount of detailed work which was not of a strictly administrative or executive nature.

During the two years that the Act was in effect, Respondent never questioned his employment arrangement. The first notice Petitioner had of any claim was this suit which was filed after the employee had resigned to take a better place with another company. The opinions of the Courts below disclose that even when the suit was filed, the employee did not have in mind a definite claim or contention with respect to any unpaid wages. The bill of complaint, as amended, was in the alternative, on the theory that there might be some possible constructions of the Act which could, in some way, result in a recovery. It was stipulated, by way of illustrating the legal question, that the maximum number of hours for any week or two during the two years he worked after the Act became effective, would be approximately 75 hours. This was done for an assumed maximum week in order to test the theory of the case.

The contract as it was understood and applied by the parties:

Rate—$27.50 per week.

Short week example: Workweek—slack period—40 hours x 30¢ per hour, minimum wage under Sec. 6—$12.00 per week. Employer paid additional $15.50 in cash in ex-

cess of minimum and gave vacation and sick leave with pay. Consideration for excess payments—availability of trained employee's service for both slack and peak business periods.

Long week example: Workweek of 75 hours at 30¢ per hour under Sec. 6—$22.50, assuming that Sec. 7 is not applicable because of the exemption in Sec. 13(b).

If Sec. 7 were applicable to Respondent, the agreement would cover a workweek of approximately 75 hours, as follows: 30¢ for 42 hours—$12.60, plus 33 hours at 45¢ —$14.85, or $27.45 per week.

Respondent now says that the contract which the parties made and performed under for two years was null and void by reason of the Fair Labor Standards Act, and that instead of $27.50 per week being compensation for the job and the hours worked, it covered only the statutory workweek of 42 hours. He claims that his pay is $0.655 per hour ($27.50 divided by 42 hours), or more than twice the minimum wage covered by law, and then demands more money for overtime at penalty rates.

Applying this theory to a workweek of 75 hours, Respondent claims 42 hours at $0.655, or $27.50, plus 33 more hours at one and one-half times $0.655 or $0.982 per hour, or $32.40. He adds the sum of $32.40 to the $27.50 per week which was paid, making a total of $59.90 per week, and then claims an additional penalty of $32.40 per week, making a total of $92.30 per week. To this total is added attorney's fees and costs.

Respondent now says, as one of his alternative claims, that instead of $27.50 per week being compensation for the job and the hours worked, the payment covered only straight time pay for these hours of work, and that no

penalty wage, required by law, was paid for the overtime hours. The Court below adopted this latter view.

For straight time and overtime, this employee was always paid in excess of the wage prescribed by the Act, and during the short weeks he received greatly in excess of the hourly rates fixed under the Act. It is said, by the Administrator, that an employer may not average the compensation given an employee over more than one week, and even if that be so, in this case, Petitioner contends that the law was fully complied with for every week computed separately.

There is nothing in the Act which appears to prevent the making of wage contracts on a lump sum basis. However, the Circuit Court decided that if a man is employed by the week, at a flat weekly salary, the employer at the end of the week must divide the total number of hours worked into the total compensation paid, thereby determining for the first time his straight time pay. Thereupon, the employer is necessarily further indebted to the employee for the overtime hours at one and one-half times the straight time wage so determined. This ruling prohibits a weekly or monthly salary agreement with any kind of an employee subject to the Act, to cover indefinite hours, even though the lump sum salary exceeds straight time minimum wages under Section 6 and overtime wages measured by Section 6 standards.

This construction given the Act has a two-fold effect. It not only extends the coverage of the Act to classes of employees above the minimum wage classes and compels the payment of overtime at penalty rates on wages far in excess of minimum wages, but it has the further effect of reforming contracts so as to establish straight time wages in excess of those fixed by Section 6. For example:

If the employee was paid $27.50 per week and worked 50 hours, his straight time hourly rate would be determined by dividing 50 hours into $27.50, which produces $0.55 per hour or 83% in excess of the maximum straight time rate prescribed under Section 6. Nevertheless, the employer would still owe the employee the penalty rate under Section 7 for 10 hours to the extent of an additional 50% of this so-determined straight time rate.

So, we not only have the question as to whether Section 7 covers employees in the high-salaried brackets, but we have the further result that the straight time wages are raised far in excess of the limitations placed in the Act by both Sections 6 and 8.

This Court in the *Darby* case, supra, sustained the constitutionality of the Act on the grounds that the commerce power may be properly employed to prevent "spreading and perpetuating . . . sub-standard labor conditions". At pages 115-116, the Court said:

> "The motive and purpose of the present regulation is plainly to make effective the congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under sub-standard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows . . . we conclude that the prohibition of the shipment interstate of goods produced under the forbidden sub-standard labor conditions is within the constitutional authority of congress . . ."

It is Petitioner's contention that though the constitutionality is clearly settled as to the question of correcting "sub-standard labor conditions", a construction of the Act which has no relationship whatsoever to "sub-standard labor conditions" would nonetheless be unconstitutional,

for the potentiality of such a construction is to destroy freedom of contract between employer and employee.[14]

*Wilson, etc., v. New*, et al., 243 U. S. 332;
*Remer v. Czaja*, 36 F. Supp. 629.

Minimum wage legislation has been upheld on the ground that it is a proper exercise of the police powers which have direct relationship to the establishment of a rate essential to "the minimum requirement of health and right living".

*West Hotel Company v. Parrish*, 300 U. S. 379.

The *Darby* case followed the *West Hotel Company* case, stating at page 125:

> "Since our decision in *West Hotel Company v. Parrish*, 300 U. S. 379, it is no longer open to question that the fixing of a minimum wage is within the legislative power and that the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment."

The *West Hotel Company* case overruled a long line of prior decisions which held minimum wage statutes unconstitutional for the reason that they had no relation to the reasonable value of the workers' services and that they thereby violated the Fifth or the Fourteenth Amendment as the case may be. In one of these cases Mr. Justice Holmes (dissenting) stated:

> "This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirements of health and right living."

*Adkins v. Childrens Hospital*, 261 U. S. 525, 570.

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[14] See The Federal Wages and Hours Act, 52 Harvard Law Review 646, 666, expressing the serious constitutional doubts that would arise if the Act were to be interpreted as applying to "wages or hours that are more than sufficient according to present Congressional criteria".

The position of Respondent is necessarily that Congress has such power to regulate commerce that, irrespective of the question of public health, morals and general welfare, it can willy nilly establish an arbitrary sum which must be paid to all employees "in commerce". Such a position maintains that Congress can regulate maximum wages as well as minimum wages, which is directly contrary to all of the rulings of this Court prohibiting unwarranted interference with the freedom of contract in respect to personal employment, which "is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons who have no other honest way to begin to acquire property, save by working for money".

*Coppage v. Kansas*, 236 U. S. 1, 14.

It is pertinent in this regard to consider the dissent of Mr. Justice Sutherland in the *West Hotel Company* case, "it is hard to see why the power to fix minimum wages does not connote a like power in respect of maximum wages". Furthermore, exercise of such power with respect to wages above the minimum under the guise of regulating commerce could be used against employees and for employers. It would constitute an abandonment of all constitutional safeguards respecting employment and freedom of contract. It necessarily results in economic totalitarianism.

In the case of *Fleming v. A. H. Belo Corp.*, 121 F. (2d) 207, at pages 214-215, the Court said:

> "Freedom of contract, within constitutionally valid limitations, is, in the United States of America, one of the fundamental freedoms and this particularly so in regard to labor relations. When, then, it is contended as here, that a statute has cut off or limited this freedom, a litigant, must point to something more than his opinion that it ought to be cut off or limited,

must point to language clearly and validly so providing. There is no more authoritative principle in the field of labor law than that, subject of course, to valid statutes designed to prohibit substandard conditions and unfair labor practices, wages, hours, and work conditions are the proper subject of contract between employer and employee and their agreements must be, and are, given full effect in the courts.

* * * * * * *

"Whether Congress could constitutionally fix a minimum wage and then compel employers wishing to provide for fixed weekly salaries to pay a wage higher than the minimum so fixed, might raise a serious constitutional question."

Similar comments have been made by other federal and state courts in several cases. In *Fleming v. Stone*, 41 F. Supp. 1000, at page 1004, the court said:

"To be sure these agreements were made previous to the passage of the Act, but if, before the passage of this Act, defendants and their employees agreed that the weekly salaries for fluctuating hours should cover any overtime which they might work in any given week, I can find nothing in the Act which prohibits the continuance of such contracts after the passage of the Act, provided the minimum-wage conditions of the Act are complied with. There is no charge in the present complaint that the minimum-wage provisions of the Act are not complied with."

In the case of *Schlee v. Lincoln Oil Co.*, (C. C., Wayne Co., Mich., 12/31/41) 5 Wage Hour Rept. 72, at pages 74 and 75, the court said:

"When this contract of February, 1939, was made, I am convinced that both plaintiff and defendant understood the $35.00 a week was to be in full of regular time and overtime as well . . . The contract between employer and employee was based upon this understanding, and such a contract between employer and

employee is a valid contract so long as it does not contravene the minimum-wage provided in the Wages and Hours Act".

The decisions in the cases of *Woods v. Wilkerson*, 40 F. Supp. 131, and *Fleming v. Atlantic Co.*, 40 F. Supp. 654, are to the same effect.

The Act was not passed as emergency legislation, of temporary nature, but was of permanent character. It is therefore necessary to interpret it with a view that Congress intended it to be applicable to changing economic conditions, which were certain to arise.

The construction for which Petitioner contends is unquestionably consistent with the constitutional powers of Congress. There is nothing in the Act which in any way indicates that Congress intended to go beyond this recognized application of its legislative powers. Conversely, the interpretation maintained by Respondent that the contract is reformed, if upheld, would result in the substitution of governmental fiat for the system now enjoyed of free enterprise. It is not to be presumed, in the absence of the most fixed and positive terms of a statute, that Congress intended to pass unwise and non-judicious legislation.

*Wilson v. Rousseau, et al.*, 4 How. 646;
*Wilson, etc., v. New, et al.*, 243 U.S. 332.

The effect of the ruling by the Court below is that the contract of employment must be reformed in a manner that forces the straight time wage above the minimum prescribed by Section 6, thereby forcing the result that overtime has not been paid in accordance with Section 7. How can it be legally possible through judicial reformation of the contract to force the straight time wage above the limitations set by Congress? How can it be legally possible

through judicial reformation of contract to convert compliance with the law into a violation of the law? It is only by reason of a judicial reformation which increases the straight time wage above the statutory minimum that any violation of Section 7 can be claimed.

## III.

**THE DOUBLE PENALTY PROVISIONS OF SECTION 16, AND THE OVERTIME PAY PROVISIONS OF SECTION 7 IN THE NATURE OF A PENALTY, ARE DISCRETIONARY WITH AND NOT MANDATORY UPON THE COURTS IN CASES OF GOOD FAITH LITIGATION, AND A RULING THAT THEY ARE MANDATORY DEPRIVES PETITIONER OF THE PROTECTION OF THE "DUE PROCESS" PROVISIONS OF THE CONSTITUTION.**

It is contended by Petitioner that the entire claim of Respondent is in effect one for the assessment of a penalty, and because of this nature of the suit it is not mandatory upon the Court to necessarily allow it.

The suit concerns the application of two penalties. The provisions of Section 16 (b), providing that an employee may recover unpaid compensation found to be due him, and "an additional equal amount as liquidated damages", are contained under the sub-heading "Penalties" and the title well describes the nature of the thing. In the case of *Thompson, et al. v. Daugherty*, 40 F. Supp. 279, the court commented, at page 286, "The intrinsic nature of the additional allowance would seem to make it a penalty rather than properly liquidated damages . . ."

The double recovery is nonetheless a penalty despite the wording of the statute "liquidated damages". The court in the case of *Anderson v. Meacham*, 62 Ga. App. 145, 8 S. E. (2d) 459, at page 460, stated: "The fact that an employee may bring his action for an additional equal amount as liquidated damages is nothing more or less than a pen-

alty fixed or incurred under the law of the United States. We think the employee in this case having elected to bring his action for a penalty . . . is restricted to the United States court for his relief . . ."

The provisions of Section 7 are that an employee is entitled to recover one and one-half times the regular rate for overtime employment in excess of the maximum hours therein provided. Such type of provision has been held to be a "mild penalty" by this Court in the case of *Bunting v. Oregon*, 243 U. S. 426. In construing this particular section in the case of *Fleming v. Carleton Screw Products Co.*, 37 F. Supp. 754, at page 758, the court said "This section does not purport to regulate wages but imposes a penalty on overtime work . . ."

The theory of penalties usually contemplates a public purpose rather than a private purpose. Whether some public purpose is to be served by limiting the sovereign's right to inflict penalties where the violations were wilful and not so limited when the penalty is inflicted by a private suit, would seem to be open to question.

Comparing the penalty provisions of the Fair Labor Standards Act with those of numerous other acts which have come before this Court, it does not appear that there is any difference in the discretionary powers of the Court when parties have, in good faith, sought to have their rights and liabilities determined.

Petitioner, a common interstate motor carrier, operating under the authority of the Interstate Commerce Act, Part II, had *bona fide* reason to believe that it was not subject to Section 7 of the Act because of the exemption provisions contained in Section 13 (b). The exemption included every employee "with respect to whom the Inter-

state Commerce Commission has power to establish qualifications and maximum hours of service".

Section 204 (a) (1) of the Interstate Commerce Act, Part II, gave the Commission authority, as to common carriers, to prescribe "qualifications and maximum hours of service of employees" and there was no limitation contained in that statute with respect to classes of employees or purposes of regulation. This provision is to be distinguished from that in Sub-Section (3) of that law, relating to private carriers, that the Commission should establish, *if need therefor is found,* qualifications and maximum hours of service of employees insofar as safety of operation of vehicles was concerned. As to common carriers no exceptions or purpose was provided but as to priyate carriers a specific purpose was stated.

A controversy resulted as to whether all employees of common carriers were exempted from the effect of Section 7 by reason of the fact that Section 13 (b) provided that the former Section should not apply to employees who were subject to the power of regulation of hours by the Commission. The question was the extent of the powers of the Commission.

American Trucking Associations, Inc., national trade association for the motor carrier industry, appeared and participated as representative of its members, of which Petitioner is one, in all of the many proceedings before the Commission having reference to that body's power under Section 204 (a) to establish maximum hours of service for employees of interstate motor carriers.

The Commission prescribed on January 27, 1939 maximum hours of service for drivers employed by common and contract interstate motor carriers in *Ex parte M C-2,*

11 M. C. C. 203, and on May 1, 1940 maximum hours of service for drivers employed by private interstate motor carriers in *Ex parte MC-3*, 23 M. C. C. 125.

On May 9, 1939, in *Ex parte MC-28*, 13 M. C. C. 481, the Commission determined, subsequent to several hearings held for that purpose, that its power to establish qualifications and maximum hours of service was limited to those employees who were engaged in duties which affected safety. The Association promptly, on May 26, 1939, brought suit to set aside the findings of the Commission, and on December 4, 1939, a three-judge court in *American Trucking Assns., Inc. v. U. S.*, 31 F. Supp. 35, rendered its decision favorable to the Association's contention that the Commission had jurisdiction over all employees of for-hire motor carriers, but recognized the limitation with respect to private carriers.

This Honorable Court in *U. S. v. American Trucking Assns., Inc.*, 310 U. S. 534, in a 5-to-4 decision reversed the lower court and sustained the Commission's finding. This decision was rendered May 27, 1940, and petition for rehearing was denied Oct. 14, 1940, 311 U. S. 724. This litigation on the jurisdictional question covered more than a two year period and during that period the motor carrier industry pursued its every course in order to determine which of these two Acts governed it.

The final decision by this Court that the Commission's jurisdiction was limited to safety did not afford any answer to the question of "which employees are engaged in activities affecting safety" and this answer was not known until the finding made by the Commission on that question on March 4, 1941, in *Ex parte Nos. MC-2 and MC-3*, 28 M. C. C. 125, that its jurisdiction went to me-

chanics, loaders and helpers (in addition to drivers) employed by common, contract and private motor carriers.

Respondent was engaged in several duties, one of these being the dispatching of trucks. In that position it was necessary that he know the size and capacity of the vehicles and the weight limitations governing highways and bridges, and issue proper loading instructions so that axle loads would be in compliance with law. The employer could not anticipate whether or not the Commission would take jurisdiction over "dispatchers", and there was the added question whether or not this particular employee was a supervisor or administrator, and as such exempted by Section 13 (a) from the overtime provisions of Section 7.

The fixing of exhorbitant liquidated damages by legislative fiat without opportunity to test the issues before the courts would undoubtedly be a denial of "due process" if as Respondent contends and the Circuit Court held, the imposition of such penalties is mandatory and not discretionary with the Courts. In this case the situation is aggravated because of the assessment of penalties retroactively from date of findings of fact by the Interstate Commerce Commission, and Petitioner could not possibly anticipate what these findings would be.

In the case at bar Petitioner through its trade association[15] diligently endeavored to ascertain the proper administrative agency having jurisdiction over it. The claimant had made no demand for the penalty to be applied, and voluntarily accepted the money as full payment. Courts in numerous cases arising under various statutes have refused to award a penalty in good faith litigation involving pri-

[15] American Trucking Assns., Inc.—see petition of that body to intervene in this proceeding as *amicus curiae* (R. 51-52).

vate parties, stating that to do so would prohibit a litigant access to the courts in an effort to obtain a ruling on the matter in controversy.

The comment of a federal court in considering the penalty provisions of the Gold Reserve Act, clearly states the law as laid down by this Court in numerous cases: "Though defendants should not prevail in such a suit, proceedings instituted in good faith to test rights have never, to our knowledge, been followed by the imposition of penalties, fines, or imprisonment." *Uebersee Finanz-Korporation, etc. v. Rosen*, 83 F. (2d) 225 (1936).

This has been the uniform ruling of this Court and the lower courts involving various other acts in numerous cases. Among the more important acts is the so-called "Seamen's Act," 46 U. S. C. A. 596, which prescribed certain penalties for withholding wages. This penalty question was passed upon in a great number of cases, some of which are:

*Franco, et al., v. Seas Shipping Corp.*, 272 Fed. 542 (D. C., Md., 1921);
*Meyer v. Dollar S. S. Line*, 43 F. (2d) 425 (D. C., Wash., 1930);
*O'Hara, et al., v. Luckenbach S. S. Co.*, 16 F. (2d) 681 (C. C. A., 1926);
*Pacific Mail S. S. Co. v. Ed. Schmidt*, 241 U. S. 245 (1916);
*The Cubadist*, 252 Fed. 658 (D. C., Ala., 1918);
*The Geo. W. Wells*, 118 Fed. 761 (D. C., Mass., 1902);
*The Silver Shell*, 255 Fed. 340 (D. C., N. Y., 1918).

The provisions of the Federal Trade Commission Act with respect to penalties were similarly passed on in *Federal Trade Commission v. Millers National Federation*, 23 F. (2d) 968 (1927).

Numerous state acts involving penalties have been reviewed by this Court:

*Chesapeake & Ohio Ry. Co. v. Conley*, 230 U. S. 513 (1912);
*Ex parte Young*, 209 U. S. 123 (1908);
*Missouri Pacific R. Co. v. Tucker*, 230 U. S. 340 (1913);
*Natural Gas Pipe Lines Co. v. Slattery, et al.*, 302 U. S. 300 (1937);
*Oklahoma Operating Co. v. Love, et al.*, 252 U. S. 331 (1920);
*St. Louis Iron Mountain & S. Ry. Co. v. Williams, et al.*, 251 U. S. 63 (1919);
*Wadley Southern Ry. Co. v. Georgia*, 235 U. S. 651 (1915).

In all of these cases, it was held that the infliction of penalties during the period of good faith litigation would be in conflict with the "due process" provisions of the Constitution.

In the case of *The Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381 (1940), this Court continued the protection of a good faith litigant to the time of denial of petition for re-hearing.

The case at bar involves a fundamental difference from the facts in those cases arising under this Act which held that the imposition of the "liquidated damage" feature was mandatory upon the courts. None of those cases concern an employer subject to the Interstate Commerce Act. None concerned an employer who was left in a twilight zone relative to jurisdiction under the two Acts until the question was finally set at rest when the Commission made its finding.

In the Fair Labor Standards Act we have a law which with respect to the application of Section 7 is dependent

upon a factual determination by the Interstate Commerce Commission. A precedent is found in the Railway Labor and Carrier Taxing Acts where the application of these acts to electric lines is contingent upon a factual determination by the Commission. In connection with these latter acts the courts have enjoined the imposition of penalties prior to determination of the facts by the Commission.

*Chicago S. S. & S. B. R. R. v. Fleming*, 109 Fed. (2d) 419 (1940).

In the case of *Clour v. Jones* (E. D. Okla., 6/19/41), 4 Wage Hour Rept. 353, the court refused to assess a penalty for double damages where it found the employer had believed in good faith that the Act did not apply, stating at page 353 "under that state of facts the court does not believe that the defendant should be required to pay an amount as liquidated damages, having compensated the plaintiff in full for his overtime to date of his discharge".

The Petitioner should be exempted from both of the penalty provisions of this law, for it acted in good faith and this suit was brought prior to the determination by the Commission on this most controversial question. The penalties are not retroactive in effect but speak as of the time of the determination by the Interstate Commerce Commission on March 4, 1941, concerning which employees in the transportation business conducted by the Petitioner are exempted from the provisions of Section 7 of the Act.

The ruling of the Court below which inflicted penalties to be recovered by a private party, retroactively and during the period of good faith litigation, is believed to be in the teeth of the established law governing the question.

It might be added that the good faith of Petitioner in litigating these issues has never been questioned; the Court

below had this to say (R. 77): "It seems a keen injustice for employers bewildered by strange legislation and confused by divergent authorities in the courts, to be subjected to such a measure." However, the Court made no effort to distinguish the Fair Labor Standards Act from the other acts in connection with which this Court has held that penalties could not be inflicted during good faith litigation. The fact that this Court in *U. S. v. American Trucking Assns., Inc.*, 310 U. S. 534, divided 5 to 4 on one of the controlling issues in this case—whether penalty wage provisions of the Act applied to the motor carrier industry at all—is clearly indicative of the *bona fides* of the litigation.

## IV.

**THE ACT IMPOSES A LEGISLATIVE FUNCTION TO BE PERFORMED BY THE INTERSTATE COMMERCE COMMISSION FOR THE PURPOSE OF IMPLEMENTING THE SCOPE OF SECTION 7, AND PRIOR DETERMINATION OF FACTS BY THE COMMISSION IS A PREREQUISITE, UNDER THE PRIMARY-JURISDICTION RULE, TO ACTION BY THE COURTS.**

Petitioner makes the further contention that by reason of the exemptions contained in Section 13 (b) only the provisions of Section 6 of the Fair Labor Standards Act applied to Respondent during the term of his employment, and inasmuch as Respondent was at all times paid an amount in excess of the straight time minimum wages prescribed by Section 6, he is entitled to no additional compensation.

This case comes before the Court following a series of legal and administrative proceedings which were necessary for the purpose of determining whether Section 7, the maximum-hour provisions of the Fair Labor Standards Act, was applicable to Petitioner and Respondent under any circumstances, and subsequently, proceedings were

held for the purpose of determining under what circumstances the parties might be subject to the Act.

By way of explanation of the prior proceedings, attention is called to certain exemptions in Section 13(b) of the Act. That Section exempts from the maximum-hour provisions of Section 7, "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act, 1935 (now referred to as the Interstate Commerce Act, Part II)".

Petitioner believed that the Interstate Commerce Commission had power to prescribe qualifications and maximum hours of service for all employees of common and contract carriers under the provisions of paragraphs (1) and (2) of Section 204, and that the Commission's jurisdiction was limited under paragraph (3) of the same Section to private carrier employees whose duties affected safety. That question reached this Court in the case of *U. S. v. American Trucking Assns., Inc.*, 310 U. S. 534 (May 27, 1940), in which this Court held, by a 5-to-4 decision, that there was no distinction in the Commission's power as between for-hire and private carriers and that the Commission's jurisdiction was limited to employees whose duties affected safety. A petition for rehearing was denied by this Court on October 14, 1940, 311 U. S. 724.

Following this decision, the Interstate Commerce Commission instituted an investigation to determine which employees had duties affecting safety, and that proceeding before the Commission, known as *Ex parte MC-2 and MC-3*, decided March 4, 1941, is reported in 28 M. C. C. 125.

Respondent instituted this suit on October 29, 1940, which, it will be observed, was prior to the determination by the Commission of the question as to whether the duties of a dispatcher affected safety. Petitioner moved to dismiss the suit on the ground that the Interstate Commerce Commission alone had the power to make a factual determination because of the necessity for uniform application throughout the country, and as the proceedings before the Commission had not been completed, Respondent's action was premature.

This Court has said that "when the final act (of a Commission) is legislative, the decision which induces it cannot be judicial" and therefore "litigation can not arise until the moment of legislation has passed".

*Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210.

The District Court overruled the motion for dismissal on February 20, 1941, *Missel v. Overnight Motor Transportation Company, Inc.*, 36 F. Supp. 980. After certain pretrial conferences and agreements with respect to stipulations, the case was argued on its merits before the District Court on April 24, 1941, and was decided July 28, 1941, 40 F. Supp. 174.

It is to be noted that between the date of the decision denying the motion to dismiss on February 20, 1941, and date of hearing on the merits, April 24, 1941, the Commission rendered its decision on March 4, 1941, determining the status of employees such as Respondent, which fact rendered moot the question as to the jurisdiction of the Court to determine the status of Respondent in advance of a determination by the Commission. However, the date of the Commission's determination remained of great importance because there was presented the question as to whether this factual determination and the legislative pro-

ceedings by the Commission spoke for the future or could possibly have the effect of creating retroactive liabilities and penalties under the Fair Labor Standards Act.

The law imposes upon the Interstate Commerce Commission the duty of determining which employees have duties affecting safety, and that determination when made establishes the scope of Section 7 as to transportation employees. The Commission's jurisdiction is broader than the mere matter of hours, because it also is required to establish qualifications of employees, a matter not dealt with in the Fair Labor Standards Act, and the exemption of Section 13(b) runs to both powers of the Commission.

We take the view that action by the Commission is necessary to implement the Fair Labor Standards Act as to transportation employees. Congress well understood the necessity for uniform treatment of transportation matters involving interstate commerce and knew that the Commission and not the Administrator was the proper body to make these determinations. The Commission fixes rates, determines the income of the carriers, and necessarily must lead and not follow in cases of this kind. The Commission conducted an exhaustive investigation which required time before it determined which employees were engaged in duties affecting safety. Petitioner contends that the determination by the Commission fixed the date for the application of Section 7 of the Fair Labor Standards Act. The Courts below ignored these questions in the opinions although they were presented and argued.

In delegating to the Interstate Commerce Commission jurisdiction to make the necessary determinations, which in turn affects the coverage of the Act, Congress merely followed a long-established procedure under the Railroad Labor and Carrier Taxing Acts. The coverage in these

statutes was contingent upon a determination by the Commission of classes of railroads, such as the distinction between steam roads and interurban lines, etc. These laws were mandatory upon the carriers, but they were not effective until they were implemented by findings by the Interstate Commerce Commission.

In a number of cases involving the construction of statutes administered by the Interstate Commerce Commission, this Court has held that the necessity for uniform rulings was an essential part of the scheme of regulation of interstate transportation and such uniformity can only be established by the Commission and cannot be established by the courts.

In the case of *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426 (1907), an action was brought by a shipper against a common carrier for relief from an unreasonable freight rate charged on an interstate shipment. The court denied redress, stating that the Interstate Commerce Commission had sole original jurisdiction on the question of reasonableness of rates, and that to determine otherwise on the statute involved would prevent uniformity in freight charges which was one of the basic purposes to be accomplished by the Interstate Commerce Act.

*Armour & Co. v. Alton R. Co.*, 312 U. S. 195 (1941);
*Mitchell Coal & Coke Co. v. Pennsylvania R. R.*, 230 U. S. 247 (1913);
*Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U. S. 285 (1922);
*Texas & Pacific R. Co. v. American Tie & Timber Co.*, 234 U. S. 138 (1914).

It is unfortunate that in this case the Court below did not discuss the question, because insofar as Petitioner is concerned, it is of vital importance.

The Administrator has taken the position that all employees subject to this dual jurisdiction are subject to the Fair Labor Standards Act until the Commission has acted. This view, we think, would be inconsistent with the duties of the Commission in its regulatory power over transportation agencies and is certainly in conflict with the decisions of the district courts which have had occasion to consider the matter in connection with this Act.

*Faulkner v. Little Rock Furniture Mfg. Co.*, 32 F. Supp. 590;
*Bechtel v. Stillwater Milling Co.*, 33 F. Supp. 1010;
*Gerdert v. Certified Poultry & Egg Co.*, 38 F. Supp. 964;
*Gibson v. Wilson* (D. C., Tenn., 3/20/41), 4 Wage Hour Rept. 259;
*Tinerella v. Des Moines Transp. Co.*, 41 F. Supp. 798;
*West v. Smoky Mountains Stages, Inc.*, 40 F. Supp. 296.

In *Faulkner v. Little Rock Furniture Mfg. Co.*, supra, a driver's helper employed by a private interstate motor carrier sued for unpaid overtime compensation under the Act. The court held that there is and could be no reservation of power to the Administrator and that it had no jurisdiction until such time as the Interstate Commerce Commission saw fit to act. The court stated, at page 592:

> "In the case at bar Congress having imposed upon the Interstate Commerce Commission the duty of prescribing maximum hours of service for those in the class with the plaintiff, it has occupied the field and therefore no one but the Interstate Commerce Commission can make such regulations."

In *Bechtel, et al., v. Stillwater Milling Co., et al.*, supra, involving suit by a driver employed by a private interstate

motor carrier for unpaid overtime compensation covering a period prior to date of May 1, 1940, when the Interstate Commerce Commission took jurisdiction over hours of service for drivers employed by private carriers, the court held that the employee had no cause of action for the Act exempts employees which the Commission *has power* to regulate, and ruled that the power granted is exclusive, and that this was recognized by Congress in passing the Act, stating at page 1012 "certainly the failure of the Interstate Commerce Commission to prescribe maximum hours of service of employees does not divest the Commission of the power granted to it by Congress".

In *West v. Smoky Mountain Stages*, supra, a suit by a mechanic employed by a common interstate motor carrier, the court found for the employer, stating at pages 298-299, "The fact that the Interstate Commerce Commission may not have assumed jurisdiction over mechanics prior to this suit, is immaterial. The exemption of employees from application of the Fair Labor Standards Act is not made, by Section 13 (b) of the Act, to depend upon the exercise of power over them by the Interstate Commerce Commission, but merely upon the existence of 'power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act'."

Until the Commission's determination on March 4, 1941 as to which employees were engaged in work affecting safety, and therefore were persons subject to its power, a carrier could not know what rule would issue concerning a rate clerk or a dispatcher, nor was there any way in which Petitioner could anticipate the ultimate determination. Interpretative Bulletin No. 9 of the Administrator throws no light on the matter for he had not any jurisdiction whatsoever to hold hearings in order to establish a finding of fact relative to "safety", and any comment by

him without the benefit of facts developed at such a hearing is presumptive and lacking all foundation.

Respondent contends that the District Court could make the finding which it did The same reasoning would permit a court or the Administrator to say that a driver, helper, loader, or mechanic was subject to Section 7 until the Commission issued its finding as to "safety" employees. The necessary result is a retroactive liability covering a period of approximately two years, concerning which liability Petitioner had no warning that it should establish reserves to meet it.

It was only on March 4, 1941, when the Commission decided which employees of interstate motor carriers were engaged in activities affecting safety, that we knew which governmental agency had permanent jurisdiction over the employee in question. Until then, Petitioner contends, the Commission had sole jurisdiction, and that until that date it was only required to pay the minimum wages prescribed by Section 6, and this it has done.

The issues involve questions of national economics of far-reaching importance, with particular reference to transportation. Congress has given recognition to transportation problems in the numerous exemptions contained in Section 13. The decision of the Circuit Court would greatly impair the operating efficiency of transportation agencies if they be unnecessarily subjected to penalty overtime wages under rigid rules which may be appropriate for fixed plant operations.

Direct labor costs represent 50% of the operating expenses of common carriers by motor vehicle and the margin between operating expenses and gross income averages 3% for the nation. The undetermined potential increase in labor costs depending upon the final determination of the questions presented here, exceeds the present and past

operating margin under the rates published with the Interstate Commerce Commission. The potential cumulative retroactive wage claims, together with statutory penalties, if applied during the period of more than two years of uncertainty and conflicting decisions, would exceed the assets of the industry.

Numerous labor contracts with the American Federation of Labor are at variance with the interpretations placed on the Act by the Wage-Hour Administrator and some of the courts, and the industry is unable voluntarily to reconcile the conflicting views.

Petitioner contends that the action of the Interstate Commerce Commission, in holding hearing and determining which employees were engaged in activities affecting safety, was carrying out a legislative function implementing the Fair Labor Standards Act and therefore Section 7 cannot speak as to employees of Petitioner until after the Commission made its finding. The District Court in effect ruled in advance of the finding that the Commission could not have evidence presented to it which would be substantial and prove that a "rate clerk" had duties which affected safety. The Commission was legislating for the future; not making a judicial determination on a law already in operation.

## CONCLUSION.

WHEREFORE, it is respectfully submitted that the judgment of the Court below was in error and should be reversed.

Respectfully submitted,

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March 9, 1942.

# APPENDIX

## STATUTORY PROVISIONS.

The pertinent statutory provisions are as follows:

FAIR LABOR STANDARDS ACT of 1938, c. 676, 52 Stat. 1060 et seq., 29 U. S. C. A. 201, et seq.:

"Finding and Declaration of Policy

"Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

"(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

* * * * * *

"Minimum Wages

"Sec. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the

production of goods for commerce wages at the following *rates*—

"(1) during the first year from the effective date of this section, not less than 25 cents an hour,

"(2) during the next six years from such date, not less than 30 cents an hour,

"(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the *rate* (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under Section 8, whichever is lower, and

"(4) at any time after the effective date of this section, not less than the *rate* (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8."

* * * * * *

"Maximum Hours

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a *rate* not less than one and one-half times the regular *rate* at which he is employed."

* * * * * *

"Wage Orders

"Sec. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum *rate* or *rates* of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

"(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage *rate* or *rates* to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage *rates* for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

"(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage *rate* (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage *rate* which

the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage *rates* for such classifications, no classification shall be made, and no minimum wage *rate* shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

"(1) competitive conditions as affected by transportation, living, and production costs;

"(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

"(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry."

* * * * * *

"Exemptions

"Sec. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); . . ."

"(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part 1 of the Interstate Commerce Act."

* * * * * *

"Penalties

"Sec. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

"(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

* * * * * *

INTERSTATE COMMERCE ACT, PART II (formerly Motor Carrier Act, 1935), c. 498, 49 Stat. 546 et seq., 49 U. S. C. A. 301, et seq.:

"General Duties and Powers of the Commission

"Sec. 204. (a) It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.[16]

[16] Subsection (2) contains similar provision as to contract carriers.

"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term 'motor carrier' shall be construed to include private carriers of property by motor vehicle in the administration of Sections 204(c); 205; 220; 221; 222(a), (b), (d), (f), and (g); and 224."